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In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES FRANCIS MELVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 24a-54a) is reported at 596 F. 2d 492.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1979. A petition for rehearing was denied on May 4, 1979. The petition for a writ of certiorari was filed on June 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the affidavit supporting the search warrant established probable cause to search petitioner's home.

STATEMENT

After a jury-waived trial in the United States District Court for the District of Massachusetts, petitioner was convicted on two counts of possession of unregistered firearms, in violation of 26 U.S.C. 5861(d). He was sentenced to two years' imprisonment, all but three months of which were suspended, and placed on probation for three years. The court of appeals affirmed, one judge dissenting (Pet. App. 24a-54a).

1. Petitioner was tried in the district court on stipulated facts. These facts showed that a sawed-off 12-gauge shotgun and a sawed-off .30 caliber carbine were discovered in petitioner's home on November 19, 1976, during a search authorized by a warrant issued on that date by a state court judge (Pet. App. 24a-25a; C.A. App. 96-98).[1] The affidavit for the search warrant stated that the affiant, a Boston police officer, was investigating an explosion on November 18, 1976, at Rooney's Tavern in Boston. The affiant was told by Patrolman Arnstein, who was regularly assigned to the area, that he had seen a white Cadillac parked at the front door of the tavern two hours before the explosion and had also seen a man, who Arnstein said "bore a strong resemblance" to petitioner, standing at the front door (Pet. App. 25a-26a, 41a-42a). Arnstein arrived at the tavern a few minutes after the explosion, and shortly after his arrival "an unknown male stated that a white Cadillac had left the scene moments before the explosion" (*id.* at 26a). The affiant verified that petitioner was listed as an owner of the tavern, that he owned a 1976 white Cadillac, and that the Cadillac was parked at petitioner's residence some 20 hours after the explosion (*ibid.*). The affiant also stated that members of

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[1] "C.A. App." refers to the appendix filed by petitioner in the court of appeals.

the bomb squad had told him that a 103-foot length of brown wire had been found at the rear of the tavern and additional wire was discovered inside the tavern, assembled in a manner consistent with use for detonating dynamite. The bomb squad members further advised the affiant that a bomb capable of causing the extensive damage that occurred at the tavern would normally be assembled in a workshop rather than in an automobile (*id.* at 26a-27a).

2. The majority below held that the affidavit established probable cause to search petitioner's residence for evidence of paraphernalia associated with the assembly of a bomb. It reasoned (Pet. App. 30a-32a) that petitioner's ownership of the tavern and a white Cadillac, and the fact that a white Cadillac had been seen leaving the tavern moments before the explosion, together with the inference that petitioner, if innocent, would have returned to check his property, "strongly pointed to [petitioner] as having played some role in the bombing". It also found that the large quantities of wire involved and the home-made nature of the device justified an inference that the bomb would have been assembled in a building, and that petitioner's home was a logical location because the tavern was subject to inspection by liquor authorities (*id.* at 32a-34a). The dissenting judge stated that in his opinion the affidavit did not establish probable cause (*id.* at 40a-54a).

ARGUMENT

1. Applying familiar principles, both courts below properly concluded that probable cause existed for the search of petitioner's home. This essentially factual determination requires no further review. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

a. Contending (Pet. 7-10) that the court of appeals formulated a "new and unprecedented" standard (*id.* at 7) in evaluating the search warrant affidavit, petitioner makes much of the court of appeals' statement that probable cause is equivalent to "reasonable cause" (Pet. App. 28a). Whatever the semantic differences between those terms, it is clear that the court of appeals did not depart from settled principles of the Fourth Amendment in determining that the affidavit provided probable cause for a search of petitioner's residence. The court stated (Pet. App. 30a):

> The evidence described in the affidavit connecting [petitioner] to the explosion was the "unknown male's" statement that a white Cadillac had left the scene moments before the explosion, Patrolman Arnstein's earlier observation of a white Cadillac and a man fitting [petitioner's] description at the tavern, the fact that [petitioner's] owned a white Cadillac, which was parked at his home the day after the bombing, and the fact that [petitioner] owned the bombed tavern. Perhaps the most important fact was the statement that the white Cadillac had left the scene "moments" before the explosion. This permitted the issuing judge to conclude that whoever was driving the car heard the explosion but did not return. Since the relative uniqueness of white Cadillacs and the earlier evidence of defendant's presence justify a conclusion that it was defendant who was driving away, the judge could further have drawn the inference of complicity from a failure to do what defendant, if innocent, would have done, i.e.,

> returned to check on his premises after hearing the explosion. If the issuing judge was entitled to credit all of this information, we think it provided him with an adequate foundation to regard [petitioner] as a prime suspect * * *.

This "commonsense and realistic" (*United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)) view of the affidavit is in accord with established standards of this Court. See *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969).

b. Nor was there any lack of "factual nexus" between the explosion and the search of petitioner's home (Pet. 11-13). Reasonable inferences—drawn from the fact that a large amount of wire was found at the scene of the explosion, as well as the great damage wreaked by the bomb—pointed to the conclusion that the bomb was not easily assembled and thus required a workplace of some sort. Petitioner's home was a likely location for such a workshop. See, *e.g.*, *United States* v. *Picariello*, 568 F. 2d 222, 227 (1st Cir. 1978); *United States* v. *Rahn*, 511 F. 2d 290, 293-294 (10th Cir), cert. denied, 423 U.S. 825 (1975); see also *United States* v. *Solario*, 577 F. 2d 554, 556 (9th Cir. 1978). Whether the tavern or other indoor sites might also have been likely locations for the workshop (Pet. 11-12) is not conclusive.[2]

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[2]The cases relied upon by petitioner (Pet. 12) afford him no support. *United States* v. *Gramlich*, 551 F. 2d 1359 (5th Cir. 1977), suppressed evidence seized from defendant's home when he had been arrested after unloading marijuana 50 miles from his home; there was no showing, unlike the situation here, that any evidence would be found in his home. To a similar effect are *United States* v. *Colon*, 559 F. 2d 1380 (5th Cir. 1977); *United States* v. *Flanagan*, 423 F. 2d 745 (5th Cir. 1970); and *United States* v. *Taylor*, No. 78-1724 (8th Cir. Apr. 18, 1979). Moreover, *United States* v. *Solario*, *supra*, also relied on by petitioner, recognized that a defendant's home, rather than other locations to which he might have access, was the most likely location for weapons. 577 F. 2d at 556.

2. Petitioner also argues (Pet. 14-18) that the "unknown male" who told officer Arnstein that a white Cadillac had left the tavern moments before the explosion was not shown to be credible or reliable within the meaning of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, *supra*. However, the courts of appeals have noted, as the Second Circuit did in *United States* v. *Burke*, 517 F. 2d 377, 380 (1975), that "there has been a growing recognition that the language in *Aguilar* and *Spinelli* was addressed to the particular problem of professional informers and should not be applied in a wooden fashion to cases where the information comes from an alleged victim of or witness to a crime." See *United States* v. *Banks*, 539 F. 2d 14, 17 (9th Cir.), cert. denied, 429 U.S. 1024 (1976); *United States* v. *McCoy*, 478 F. 2d 176, 179 (10th Cir.), cert. denied, 414 U.S. 828 (1973); *United States* v. *Unger*, 469 F. 2d 1283, 1287 n.4 (7th Cir. 1972), cert. denied, 411 U.S. 920 (1973); *United States* v. *Bell*, 457 F. 2d 1231, 1238 (5th Cir. 1972); *McCreary* v. *Sigler*, 406 F. 2d 1264, 1268-1269 (8th Cir.), cert. denied, 395 U.S. 984 (1969).

Petitioner to the contrary notwithstanding, the courts below did not use the fact that the bystander was a witness to the crime to "justif[y] [a] total abrogation of the credibility/reliability requirements" (Pet. 16). The information he provided was corroborated by Officer Arnstein's personal observation of a white Cadillac parked in front of the tavern less than two hours before the explosion. This fact "afforded a strong basis for crediting the [witness'] remark" (Pet. App. 32a). And since the information itself was "non-accusatory and did not describe criminal activity" (Pet. App. 31a), there was no reason to doubt the veracity of the witness. Under these circumstances, the court of appeals did not err in concluding that the information was properly considered

by the judge who issued the warrant. See *United States* v. *Baker*, 577 F. 2d 1147, 1149-1150 (4th Cir.), cert. denied, No. 77-6859 (Oct. 2, 1978); *McCreary* v. *Singler*, *supra*, 406 F. 2d at 1269.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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